

# Anatomy of Environmental Enforcement Actions: Administrative, Civil, and Criminal

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# Overview

## I. USEPA National Enforcement Initiatives

- Air
- Energy Extraction
- Hazardous Chemicals
- Water

## II. USEPA Enforcement Process:

- *Administrative*
- *Civil*
- *Criminal*

## III. Enforcement Case Study

- *US EPA v. Noble Energy, Inc.* (April 2015)

# *The Optics of Enforcement*



# *The Optics of Enforcement*



# *Are you worried yet?*



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ATTORNEYS AND COUNSELORS AT LAW

*If not, there's this....*



# *I. EPA's National Enforcement Initiatives*

## Air

- ❖ “Reducing Air Pollution from the Largest Sources”
  - NSR and PSD under CAA
- ❖ “Cutting Hazardous Air Pollutants”
  - Leaks, flares, and excess emissions

# *I. EPA's National Enforcement Initiatives*

## Energy Extraction

- ❖ “Ensuring Energy Extraction Activities Comply with Environmental Laws”
  - EPA v. Noble Energy (2015)
  
- ❖ Implications of Aggregation of Air Emissions – USEPA Activities
  - Summit Case
  - USEPA Summit Directive (12-12-12)
  - National Environmental Development Assn. v. EPA ( D.C. Circuit 2014)
  - Proposed Rule – Published in Federal Register Sept. 18, 2015
    - Comments due on or before 11-17-15



## *II. Enforcement*

- ❖ Enforcement can take three forms on the state or federal level
  - Administrative
  - Civil
  - Criminal
- ❖ The need for counsel
  - Attorney-Client Privilege
  - Attorney Work Product Privilege

## II. Enforcement

### A. Administrative

- ❖ **Regular Inspections** by agency (federal and/or state)
- ❖ **Information Requests**
  - Section 114 Requests – Clean Air Act
  - Section 308 Requests – Clean Water Act
- ❖ **How to Respond?**
  - Inspections: designate representative to facilitate on-site inspection
  - Information Requests
    - Devote necessary resources, assemble documents, review for privilege and confidentiality, communicate with agency (only with advice of counsel)

# II. Enforcement

## A. Administrative

### ❖ Notice of Violation (NOV)

- Agency identifies an alleged violation of rule or statute
- Requires response from recipient (~14-30 days)
- Get in Compliance/Make it go away.

### ❖ Consent Orders

- Negotiated between agency and regulated entity
- Steps to achieve compliance with stipulated penalties for failure to complete
- Identifies administrative penalties, supplemental environmental projects (SEPs), and any waiver of penalties

# *II. Enforcement*

## ***A. Administrative***

### **❖ Administrative Hearings**

- Agency issues Administrative Compliance Order
- Hearings before ALJ – “quasi-judicial”
- Regulated entity requests hearing
- Appeals
  - Is agency decision arbitrary and capricious, against procedure, or otherwise not in accordance with law?
  - This is where assertion of rights in administrative record is crucial.

## *II. Enforcement*

### *B. Civil*

1. Why would USEPA use this approach versus administrative enforcement?
2. Environmental Statutes contain civil provisions allowing USEPA to assess monetary penalties up to **\$37,500 per violation, per day.**
3. Injunctive relief

# *II. Enforcement*

## *B. Civil*

### 4. Consent Decrees

- Often negotiated between agency and regulated entity
- Lodged in federal district court for public comment and published in Federal Register
- Consent decree becomes judgment entered by a court

### 5. Most significant enforcement matters rely on this approach.

# II. Enforcement

## C. Criminal

### ❖ Criminal Prosecution

- What factors move a matter from a civil to a criminal case?
- Generally, agency conducts investigation and if it believes criminal charges are appropriate, refers case to prosecutor
  - USEPA → Department of Justice Environmental and Natural Resources Division (DOJ ENRD)
  - State → State's Attorney General's Office or Local U.S. Attorney's Office
- Importance of Counsel
  - Potential need for Joint Defense Agreement

# *II. Enforcement*

## ***C. Criminal***

- A large percentage of criminal cases proceed under the Clean Water Act
  - “Intent” vs. “Negligence” Standards
  
- Penalties/Sentencing
  - On the federal level, Federal Sentencing Guidelines are utilized
  - What about financial penalties?



# III. Enforcement Case Study

## ***EPA v. Noble Energy, Inc. (2015)***

- In January and February 2012 inspectors from EPA and Colorado Department of Public Health and Environment (CDPHE) inspected condensate tanks belonging to Noble Energy in the DJ Basin, Colorado, using optical gas-imaging infrared cameras.
- Inspectors Observed:
  - Numerous VOC emissions
  - Lack of identification numbers (AIRS numbers) for storage tanks
- Violations of Colorado's federally approved SIP and Colorado Air Emission Regulations

# III. Enforcement Case Study

## ***EPA v. Noble Energy, Inc. (2015)***

- Colorado Air Quality Control Commission Regulation Number 7 (Reg. 7)
- “[A]ll condensate collection, storage, processing and handling operations, regardless of size, shall be designed, operated, and maintained so as to minimize leakage of VOCs to the atmosphere to the maximum extent practicable.” Reg. 7, Sec. XII.C.1.b.
- Reg. 7 also requires inventory, record-keeping, and weekly inspections of tanks and control devices.

## *III. Enforcement Case Study*

### ***EPA v. Noble Energy, Inc. (2015)***

- Entered into “cooperative discussions.”
- Resulting settlement requires Noble to spend an estimated **\$60 million on system upgrades** and strict monitoring and inspections to reduce emissions. Additionally, **\$4.5 million to fund environmental mitigation projects, \$4 million on supplemental environmental projects, and \$4.95 million civil penalty.**

# III. Enforcement Case Study

## ***EPA v. Noble Energy, Inc. (2015)***

- ❖ John C. Cruden, Assistant Attorney General  
DOJ ENRD
  - “This first-of-its-kind settlement takes a basin-wide, systematic approach to address oil and gas emissions. . . . Our nation’s energy security and independence requires that oil and gas production be done safely, responsibly, and lawfully. We look forward to continuing to work with states and the oil and gas industry to ensure that oil and gas emissions are minimized nationwide.”

➤ News Release, EPA Compliance and Enforcement, April 22, 2015.

# Conclusions

- ❖ Importance of building administrative record.
  - Comments
  - Response to Information Requests
  - Response to NOV
- ❖ Importance of counsel and other outside technical expertise.
  - Audits
  - Compliance negotiations
- ❖ EPA is aggressively commencing enforcement actions against O&G.
  - National Enforcement Initiatives. *See EPA v. Noble Energy.*

# Questions?

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